

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

NATHAN BUBEL,
----- X

Plaintiff, Index No.
249/2019
against,
PHILIP GIGANTE,
Defendant.

----- X
February 28, 2019
Rockland County Courthouse
1 South Main Street
New City, New York 10956

B E F O R E: HON. SHERRI L. EISENPRESS
Acting Supreme Court Judge

A P P E A R A N C E S:

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REPORTED BY: AMBER MALKIE FINER, R.P.R.
Senior Court Reporter

Bubel v Gigante

1 THE CLERK: This is Number One on the motion
2 calendar: Bubel versus Gigante.

3 Appearances started with plaintiff, please.

4 MR. SZALKIEWICZ: Daniel Szalkiewicz - Daniel
5 Szalkiewicz & Associates, PC, 325 West 38th Street,
6 New York, New York 10018, for the petitioners in
7 this matter.

8 Good morning, Your Honor.

9 MR. GARVEY: Good morning, Your Honor.

10 Lawrence Garvey, Lawrence A. Garvey &
11 Associates, 50 Main Street, White Plains, New York,
12 for respondent candidates.

13 And, Your Honor, Brittany Patane in my office
14 is also here today, but she's downstairs filing a
15 motion.

16 THE COURT: Oh.

17 MR. GARVEY: Thank you.

18 MS. OBREMSKI: Alexandra Obremski, on behalf
19 of the Rockland County Department of Law,
20 representing the Rockland County Board of
21 Elections.

22 THE COURT: Okay. Good morning.

23 MR. SZALKIEWICZ: You need for us to step up
24 or do you want us --

25 THE COURT: You can stay there.

Bubel v Gigante

1 So, we left with the Board of Elections
2 pursuing a review of the specific objections.

3 So, what happened?

4 MS. OBREMSKI: My understanding is that the
5 review was more or less completed as to the
6 specific objections.

7 I don't know if the additional -- the
8 additional objections were not.

9 MS. ZEBROWSKI STAVISKY: They were not.

10 MS. GIBLIN: They were not by me.

11 THE COURT: They were not by you?

12 MS. GIBLIN: No, the additional ones.

13 MR. GARVEY: The issue is, Your Honor, that
14 the objections that were listed in the petition and
15 the Order to Show Cause were apparently gone
16 through.

17 But then the Bill of Particulars, which listed
18 a whole new set of objections - some of which were
19 duplications - have not been gone through.

20 THE COURT: Okay.

21 MR. SZALKIEWICZ: Well, if I may?

22 I think that the Board should be testifying.
23 I think the court actually --

24 THE COURT: No one is testifying right now.
25 We're just --

Bubel v Gigante

1 MR. SZALKIEWICZ: I think -- I think that,
2 based on what I've seen from our FOIL request, it
3 appears that the Republican commissioner did begin
4 the process of going through it and did not
5 complete it; is that correct?

6 MS. GIBLIN: That's correct.

7 MR. SZALKIEWICZ: So, it's not as though they
8 were ignored. They were worked on.

9 THE COURT: I just want to get the lay of the
10 land. Okay.

11 MR. SZALKIEWICZ: It's --

12 THE COURT: I'm not --

13 MR. SZALKIEWICZ: Assuming -- assuming --

14 THE COURT: What happened -- what happened
15 with the review of the initial objections?

16 MS. ZEBROWSKI STAVISKY: That was completed.

17 THE COURT: Okay. And what was the result?

18 MS. ZEBROWSKI STAVISKY: We didn't add
19 anything.

20 MS. OBREMSKI: They have not been tabulated.

21 THE COURT: Okay. So, do we think we should
22 tabulate them so that we can see -- I mean --

23 MR. SZALKIEWICZ: Your Honor, based on the --
24 my -- my tabulation of both of them put together,
25 the best case scenario is 155 signatures would be

Bubel v Gigante

1 knocked off line-by-line, which would be -- which
2 would mean that the petition -- the respondent
3 would still remain on the ballot, assuming that we
4 upheld each line-by-line objection.

5 MR. GARVEY: Without agreeing that those
6 objections or facts are valid.

7 THE COURT: Well, that's what we were trying
8 to get to, whether that's the case or not.

9 MR. SZALKIEWICZ: It's not dispositive the
10 line-by-line, Your Honor.

11 THE COURT: What do you mean it's not
12 dispositive?

13 MR. SZALKIEWICZ: It means that going
14 line-by-line would not resolve this case. We have
15 to reach the fraud argument.

16 THE COURT: Putting aside the fraud argument
17 for a minute.

18 MR. SZALKIEWICZ: Yes.

19 THE COURT: Based on the review by the Board
20 of Elections of -- now, are you talking about the
21 initial objections or both?

22 MR. SZALKIEWICZ: I'll give you the numbers,
23 Your Honor, I have.

24 THE COURT: Just answer my question.

25 MR. SZALKIEWICZ: Yes.

Bubel v Gigante

1 THE COURT: Based on the initial objections or
2 both?

3 MR. SZALKIEWICZ: Both.

4 MR. GARVEY: Obviously, the second set hasn't
5 been finalized.

6 THE COURT: I understand you're not
7 agreeing -- I understand you're not agreeing that
8 those are timely. But if -- if combined they don't
9 invalidate the petition, then --

10 MR. SZALKIEWICZ: Combined they're 158.
11 Assuming the splits go in the petitioner's favor,
12 because there were splits, there are 158 objections
13 that would be deemed valid.

14 THE COURT: Okay. And that would leave the
15 petition still valid?

16 MR. SZALKIEWICZ: Yes, Your Honor.

17 THE COURT: Okay. So, all you have left
18 then -- and you guys agreed to be bound by --

19 MR. GARVEY: No, we did not, Judge.

20 THE COURT: I thought you did.

21 MR. GARVEY: No, we agreed to allow them to be
22 reviewed and see what they come up with for the
23 very purpose of seeing if we're going to move
24 forward with this.

25 MR. SZALKIEWICZ: I don't believe that's

Bubel v Gigante

1 what --

2 MR. GARVEY: Oh, no.

3 THE COURT: Okay. You agree -- he's saying --
4 why are you arguing? You win. You know what they
5 tell you in law school, right, Mr. Garvey? When
6 you're winning stop talking.

7 MR. SZALKIEWICZ: We agree that the ones that
8 they both deemed to be invalid would be out. And
9 we would have the ability to re-appeal certain
10 signatures that, truthfully, even if we were to
11 re-appeal those signatures we still need to reach a
12 fraud argument.

13 THE COURT: You're mumbling. It's hard to
14 understand what you're saying.

15 MR. SZALKIEWICZ: I apologize, Judge.

16 THE COURT: No problem.

17 MR. SZALKIEWICZ: It's my understanding that
18 if both commissioners agreed that a signature was
19 not good or that the person was not deemed
20 registered for the purposes of this proceeding,
21 that signature would be out.

22 We would then have the ability, if we deemed
23 necessary, to try to rehabilitate certain of the
24 signatures coming here.

25 Again, that all being said, we would still

Bubel v Gigante

1 need to have testimony as to the fraud argument.

2 THE COURT: Right. Again, let's put aside the
3 fraud for a second.

4 MR. SZALKIEWICZ: Sorry.

5 THE COURT: We don't need to deal with the
6 signatures any longer?

7 MR. GARVEY: No.

8 THE COURT: Do we agree?

9 MR. GARVEY: No, we don't agree.

10 MR. SZALKIEWICZ: I believe --

11 THE COURT: Go ahead, Mr. Garvey.

12 MR. GARVEY: We don't agree. All right.

13 So, by virtue of the fact that -- that the
14 petitioners brought this -- this petition in court,
15 rather than go through the normal process, which
16 I'll argue about my -- my motion to dismiss, of
17 objections and specific objections, they gave the
18 court, and the court only, all right, the right
19 to -- to -- to determine whether or not that
20 signature is valid. All right. That it's the
21 court's job.

22 What we agreed to on Monday was to let them go
23 back, do their canvas and see if it's going to be
24 dispositive. All right.

25 THE COURT: But it is.

Bubel v Gigante

1 MR. GARVEY: No.

2 THE COURT: What I'm hearing is it is.

3 MR. GARVEY: No, because here's where we're
4 going to go: If I agree --

5 THE COURT: I'm missing something here.

6 MR. GARVEY: If I agree to 158 signatures and
7 we go through, all right, the fraud process, all
8 right, and they're able to knock out another 150 or
9 160, all right, then I'm off the ballot. My client
10 is off the ballot. So, like, I can't at this point
11 allow the Board of Elections to make the
12 determination. It's got to be the court.

13 THE COURT: Okay. So my understanding when we
14 left here, I thought that you guys were going -- if
15 both commissioners agreed, you were going to go
16 with it and you were going -- if there was a
17 dispute, that's what we were going to address.
18 You're saying that's not --

19 MR. GARVEY: I'm saying that -- that --
20 that --

21 THE COURT: You're preserving all your
22 objections. Okay.

23 MR. GARVEY: What you -- what the court said
24 Monday was how come the Board of Elections has not
25 reviewed these. All right. Why don't we start

Bubel v Gigante

1 there, which was a good idea. All right. And that
2 apparently has been done, at least some part of it
3 has been done. And now we're back.

4 But we're now going to fight over each and
5 every one of the additional signatures. So,
6 without the court reviewing these signatures, and
7 without hearing arguments about what does and what
8 does not match, and when it matters and when it
9 doesn't matter, my clients can't -- can't concede.

10 THE COURT: Okay. He raises a good point.

11 If -- if --

12 MR. SZALKIEWICZ: I understand that, Your
13 Honor. It obviously was not what my understanding
14 of Monday's agreement was. But if Mr. Garvey is
15 saying he thought something otherwise, I'm not
16 going to argue with him on his thoughts.

17 THE COURT: Okay. So, we're going to proceed.

18 MR. SZALKIEWICZ: So, we have several
19 witnesses outside, Your Honor.

20 MR. GARVEY: I have a motion to dismiss I'd
21 like to bring up. It's being filed downstairs now.

22 Can I approach?

23 THE COURT: Sure.

24 (Whereupon, there was a pause in the
25 proceeding.)

Bubel v Gigante

1 THE COURT: Okay. I've just been handed a
2 motion to dismiss for lack of subject matter
3 jurisdiction, lack of standing, failure to state a
4 cause of action, failure to plead with
5 particularity.

6 MR. GARVEY: Your Honor, I think in light of
7 the fact that -- that the petitioners aren't even
8 here --

9 THE COURT: Yeah, that's a bit of a problem.

10 MS. PATANE: Good morning, Your Honor.

11 Brittany Patane, with Lawrence Garvey &
12 Associates, on behalf of respondents.

13 THE COURT: Can you find out when the folks
14 are supposed to get here with the petition?
15 Counsel?

16 Mr. Szalkiewicz?

17 MR. SZALKIEWICZ: I have no -- so, I can call
18 them. I have no relation with these people.

19 THE COURT: Does anyone know, are they coming?
20 The village people.

21 MR. SZALKIEWICZ: They were all sitting in the
22 commissioner's office the other day. She has her
23 number. Do you have the number to be able to get a
24 hold of them?

25 MS. ZEBROWSKI STAVISKYTWO: I know who the

Bubel v Gigante

1 clerk is. I don't remember her number personally.
2 I can call.

3 MR. GARVEY: Your Honor, they're not here, so
4 I move to dismiss.

5 THE COURT: Well, obviously, if they don't
6 have the petitions, they can't proceed.

7 MR. GARVEY: I'm making a formal motion, Your
8 Honor, to dismiss the petition, because they cannot
9 move forward without the petitions, without the
10 original petitions.

11 MR. SZALKIEWICZ: Your Honor, I would
12 actually --

13 THE COURT: All right. It's 10:40. I'm not
14 going to dismiss --

15 MR. SZALKIEWICZ: Judge, respectfully, I will
16 accept his and I want to file a cross-petition -- a
17 cross-motion for adverse inference against
18 Mr. Garvey's clients given the fact Mr. Gigante is
19 the respondent, the village is the respondent.
20 Mr. Gigante has control over the village clerk as
21 the mayor.

22 If he wants to play that game, Judge, it's not
23 a problem.

24 THE COURT: Go outside and call these people
25 and see where they are. Let's not play games.

Bubel v Gigante

1 Okay. Let's get a phone call. Find out if they're
2 on their way or what's going on.

3 (Whereupon, there is a break in the proceeding
4 while the court continued on with its calendar.)

5 THE COURT: We'll go back on the record.

6 We're back on the record in the matter of
7 Bubel versus Gigante and Board of Elections in
8 Airmont.

9 Appearances remain the same.

10 I've been handed, by Mr. Garvey, a motion to
11 dismiss that was, I guess, filed this morning.

12 MR. GARVEY: Filed this morning, Judge.

13 THE COURT: Mr. Szalkiewicz, am I saying your
14 name right?

15 MR. SZALKIEWICZ: Close enough, Judge.

16 THE COURT: Do you want to address this? I
17 know you were just handed it, but you --

18 MR. SZALKIEWICZ: Sure, Judge. I had about
19 five minutes to review this, so obviously I'd like
20 to reserve the right to put in supplemental papers,
21 if needed.

22 I know in anticipation of their motion this
23 morning, I handed it to Mr. Garvey prior to him
24 coming in. We did prepare a letter memo for the
25 court regarding two of the issues, I believe, that

Bubel v Gigante

1 are contained within here. One is a fraud argument
2 and the other one is the Bill of Particulars being
3 untimely filed.

4 That being said, it's my understanding that
5 petitioners -- respondents are asserting that the
6 petitioners in this case are not an aggrieved
7 candidate. That is simply not the case.

8 THE COURT: So, there's two -- two significant
9 threshold issues raised, right? Subject matter of
10 jurisdiction and standing. So, let's address
11 those.

12 MR. SZALKIEWICZ: From a standing standpoint,
13 an aggrieved candidate under Election Law 16-102
14 has the right to come in.

15 What respondents are alleging is that my
16 clients are not an aggrieved candidate because they
17 are not members of the same party.

18 That is not the case under the Election Law
19 that we're running. All of the cases that they're
20 citing cite to 6-102 that relate to a designating
21 petition. This is an independent nominating
22 petition.

23 So within a designating petition, where you
24 were a Republican party, obviously a Democrat
25 cannot come in and start to mess up the election a

Bubel v Gigante

1 little bit. Here, this is an independent
2 nominating petition where you have these
3 essentially made up parties.

4 So, an aggrieved candidate under an
5 independent nominating petition is anybody that is
6 able to and is running for the same position, which
7 in this case are my clients. Mr. Bubel is running
8 for mayor, which is what Mr. Gigante is running
9 for. And Mr. Downey is running for trustee, which
10 is what the remaining two respondents are running
11 for.

12 So, as of --

13 THE COURT: Who are the other two respondents?

14 MR. SZALKIEWICZ: Valvo and Marchesani.

15 So, their case law just does not apply to
16 these situations because they only relate to
17 designating petitions. Once again, this is an
18 independent nominee petition.

19 MS. PATANE: Your Honor, if I may heard on
20 that point?

21 THE COURT: Yes, go ahead.

22 MS. PATANE: With respect to an aggrieved
23 candidate, there has to be an injury.

24 All the case law that we cited, while some of
25 them may have had designated petitions, it doesn't

Bubel v Gigante

1 necessarily not apply to nominating petitions.

2 The law is very clear that in order to be an
3 aggrieved candidate, you have to be associated with
4 the same political affiliation. These parties are
5 not a part of same political body.

6 THE COURT: So, give me some factual
7 background here, because I don't know anything
8 about this election. So, who's -- who's a member
9 of what party? What are the parties?

10 MS. PATANE: Your Honor, the respondents are
11 members of the Preserve Airmont independent
12 political body.

13 THE COURT: Preserve --

14 MS. PATANE: The petitioners are members of
15 the Protect Airmont independent political body.
16 These are two different political bodies. There's
17 absolutely no argument that the petitioners can
18 make that they're part of the same exact party.

19 In addition to that, in order to be an
20 aggrieved candidate, there has to be an injury.
21 There has to be an issue with the formalities and
22 the operations of that independent party.

23 This is not even an alleged in the petition,
24 nor is it even considered, considering they're not
25 part of that same political body.

Bubel v Gigante

1 THE COURT: So, what do you mean? Say that
2 again. I don't understand.

3 MS. PATANE: In order to be an aggrieved
4 candidate, there has to be an issue with the
5 formalities of that same political body.

6 So, for example, if the respondents are part
7 of the Preserve Airmont, if there were other
8 candidates or other members of Preserve Airmont
9 that had issues with respondents and with regard to
10 the formalities or the operations of Preserve
11 Airmont, then they had the right as aggrieved
12 candidates to bring this action.

13 The petitioners are part of Protect Airmont.
14 It's a completely different independent body. They
15 have absolutely no injury. And there's no issue of
16 formalities or -- or the operation of that body,
17 because they're not members of it.

18 MR. SZALKIEWICZ: See, Judge, here's the
19 problem with these independent nominee petitions --

20 THE COURT: Mmm.

21 MR. SZALKIEWICZ: -- these are all legal
22 fictions.

23 I believe Mr. Gigante is a registered
24 Republican. There's no way for anybody to go and
25 actually register for the Preserve Ramapo Party, to

Bubel v Gigante

1 register for whatever the other parties are here.
2 So, the allegations saying that they have an issue
3 with the way the process is working, what -- this
4 is governed by a completely separate section of the
5 Election Law.

6 What Ms. Patane --

7 THE COURT: And what section would that be,
8 counsel?

9 MR. SZALKIEWICZ: It is Section 5, I believe
10 relates to the villages, Your Honor. Article 5 of
11 the Election Law, I believe, relates to village
12 elections.

13 MS. PATANE: Your Honor, if I may?

14 MR. SZALKIEWICZ: What we're dealing with
15 here --

16 THE COURT: I'll give you a chance.

17 MR. SZALKIEWICZ: What we're dealing with --
18 what she's arguing, and actually for the most part
19 I don't disagree with what she's saying, but I
20 believe she's misinterpreting what an aggrieved
21 candidate is.

22 As the court knows any time someone is running
23 for an election and they believe that something has
24 been done wrong for what they're running for on the
25 same line, they are an aggrieved candidate and they

Bubel v Gigante

1 have the ability to come in and file a petition to
2 invalidate or to validate.

3 THE COURT: I guess her argument is -- let's
4 use Democrats and Republicans just. A Democrat
5 can't challenge the -- the designating petition of
6 a Republican, right? And vice versa?

7 MR. SZALKIEWICZ: Correct.

8 THE COURT: And the reason for that is
9 obvious, so no one can muck up --

10 MR. SZALKIEWICZ: Those are parties under the
11 Election Law, Your Honor. Here, there is no member
12 that's registered in the Preserve Airmont Party.
13 The Preserve Airmont Party is not actually a party,
14 Your Honor. It is a slate that is created under
15 the Election Law for this independent nominating
16 petition. So, if you were to look at the top of
17 each of the petitions, Judge, there's actually --

18 THE COURT: Which I don't have, but, okay.

19 MR. SZALKIEWICZ: Under -- it talks about
20 elections under 15-108. There are certain things
21 that you have to put in there, where they actually
22 selected a name of what this -- this slate is going
23 to be. It is physically impossible for anybody,
24 except for the three candidates over here, to be a
25 member of the Preserve Airmont Party, because it's

Bubel v Gigante

1 not actually a party. It's just a name that they
2 selected. They selected their own logo. It's just
3 a completely different set of rules.

4 So, this whole standing argument is, quite
5 honestly, absurd. Who else -- I can create 50
6 different petitions under the preserve whatever
7 party. I'm the only member. I would be the only
8 one that could then take myself to court. There is
9 no membership enrollment. There is no enrollment
10 process. It is literally a name that's put in
11 there. All these people are enrolled in -- in, for
12 lack of a better term, real parties: Democrats,
13 Republicans. So, that's where this sort of
14 framework that the respondents are talking about
15 comes into play.

16 MS. PATANE: Your Honor, I have two points.

17 If what counsel is saying is that essentially
18 anyone can just create any political body and file
19 petitions, that would be completely against the law
20 and allow anyone to create -- any party, create any
21 petition and file it at any time.

22 What he should have done or what his client
23 should have done was file the specific objections
24 with the Board of Elections like every other party
25 does, unless there is some other exception. But no

Bubel v Gigante

1 exception here applies.

2 The other point, counsel mentioned that Mr --

3 THE COURT: But he did -- just bear with me
4 here, because I'm not familiar with these local --

5 MS. PATANE: Sure.

6 THE COURT: -- with these village elections.

7 MS. PATANE: Sure.

8 THE COURT: So, the initial batch of
9 objections were ultimately filed with the Board of
10 Elections?

11 MS. PATANE: No, Your Honor. They were filed
12 with the court.

13 THE COURT: None of them were. They were all
14 filed with the village?

15 MR. SZALKIEWICZ: Everything is -- no, they
16 were filed --

17 MS. PATANE: They were filed by petitioner
18 with the court. They were not filed through the
19 Board of Elections or the clerk before the filing
20 of this action?

21 THE COURT: Okay.

22 MS. PATANE: And then, Your Honor, I just want
23 to make one other point.

24 Counsel mentioned that he believes that
25 Mr. Gigante is registered to the Republican party.

Bubel v Gigante

1 I believe that the other petitioners may be
2 registered to different parties. Again, that goes
3 to the aggrieved candidate argument.

4 MR. SZALKIEWICZ: It doesn't. It's --

5 MS. PATANE: I mean, he's insinuating that
6 he's -- that Mr. Gigante is, in fact, a member of
7 another political party --

8 THE COURT: I don't know why that's relevant.

9 MS. PATANE: -- and the petitioners are
10 members of other political parties. How can they
11 claim that they're aggrieved candidates? It just
12 furthers the argument.

13 MR. SZALKIEWICZ: Judge, this is -- obviously
14 we're going down the rabbit hole over here. This
15 is just total misinterpreting what the Election Law
16 is.

17 THE COURT: Well, I'm going to take a look at
18 this specific provision.

19 MR. SZALKIEWICZ: An aggrieved -- there are
20 two ways to file -- three ways under 16-102 to
21 file -- to file --

22 THE COURT: Six or 16?

23 MR. SZALKIEWICZ: 16-102, to file an
24 invalidating proceeding.

25 The first one is if you previously filed

Bubel v Gigante

1 objections with the Board of Elections, I then have
2 the right to come in -- I then have the right to
3 come in and contest what the board ruled on there.

4 MS. PATANE: Which the petitioners did not do.

5 MR. SZALKIEWICZ: Which we did not do.

6 The second way is if I'm the chairman of a
7 party. Again, there is no party we're talking
8 about here. This is a completely different beast.

9 And the third, if I am an aggrieved candidate,
10 an aggrieved candidate relating to an independent
11 nominating petition.

12 I'm not disagreeing with counsel that in a
13 normal designated petition where you have
14 Republicans and Democrats. In an independent
15 nominating petition, an aggrieved candidate is an
16 individual entitled to run in the election and
17 that's filed petitions in this case.

18 In this case, the law -- I don't really want
19 to keep going back and forth on these arguments,
20 because the law is clear. He's an aggrieved
21 candidate. We have the standing.

22 MS. PATANE: Your Honor, the law isn't clear
23 and in fact --

24 THE COURT: Okay. I understand that.

25 MR. SZALKIEWICZ: Of course, it's clear --

Bubel v Gigante

1 THE COURT: First of all, Malkie cannot take
2 down when both of you talk at the same time. So,
3 one at a time.

4 Second, I understand the dispute and I'm going
5 to take a look at that. So, let's move on to the
6 next issue.

7 What's the jurisdictional issue?

8 MS. PATANE: Your Honor, the issue of subject
9 matter jurisdiction also relates to standing in
10 that the petitioners failed to initially file their
11 specific objections with the Board of Elections or
12 the clerk prior to filing the petition with the
13 court, in that the court doesn't have jurisdiction
14 to hear this matter as the objections needed to be
15 filed timely with the Board of Elections and the
16 clerk prior to this filing.

17 MR. SZALKIEWICZ: Judge, if they're an
18 aggrieved candidate, they don't need to file
19 objections first. They can go right into court.

20 THE COURT: And where is that section? Where
21 is that?

22 MR. SZALKIEWICZ: It's beyond case law and
23 it's based on 16-102.

24 THE COURT: Okay.

25 MR. SZALKIEWICZ: I can -- as an aggrieved

Bubel v Gigante

1 candidate you always have the right to have De Novo
2 review of this court. I mean, it's just --

3 THE COURT: De Novo review of what?

4 MR. SZALKIEWICZ: I'm sorry. You always have
5 the ability to bring it to court and bring your
6 objections here. You don't need to have --

7 THE COURT: In the first instance?

8 MR. SZALKIEWICZ: In the first instance.

9 THE COURT: You're saying there's no --
10 there's no condition preceding coming to court?

11 MR. SZALKIEWICZ: Absolutely, if you're an
12 aggrieved candidate.

13 MS. PATANE: Your Honor, if you're an
14 aggrieved candidate. And again I would just --

15 MR. SZALKIEWICZ: So, if she loses the first
16 argument, she loses the second.

17 THE COURT: Got you. Okay.

18 MS. PATANE: Your Honor, in this analysis I
19 would ask that the court find or provide a
20 definition of what an aggrieved candidate is,
21 because the petitioner still has failed to prove
22 what an aggrieved candidate is and how it relates
23 to this action.

24 THE COURT: All right. Does counsel for the
25 Board want to be heard?

Bubel v Gigante

1 MS. OBREMSKI: With respect to?

2 THE COURT: Anything.

3 MS. OBREMSKI: Anything?

4 THE COURT: Yes.

5 MS. OBREMSKI: My understanding, Your Honor,
6 is that 16-102 provides standing to an aggrieved
7 candidate to anybody who is able to file
8 objections.

9 And if you look at Election Law 6-154 --

10 THE COURT: Which section?

11 MS. OBREMSKI: 6-154. It's the -- what kind
12 of -- who has the standing to file objections. The
13 court might find that elucidating.

14 THE COURT: All right. Take ten minutes.

15 (Whereupon, there was a break in the
16 proceeding.)

17 THE COURT: We're back on the record.

18 MR. SZALKIEWICZ: In the case of Lifshitz(ph)
19 v Palmateer, P-A-L-M-A-T-E-E-R, it is a Third
20 Department case, but there's multiple cases after.

21 THE COURT: Yeah, I have it here.

22 MR. SZALKIEWICZ: Okay. Respondent contends
23 that since petitioner is not a member of the
24 political party.

25 THE COURT: Yes, this is the Democrat allowed

Bubel v Gigante

1 to challenge the nomination of another party.

2 MR. SZALKIEWICZ: Exactly. Because an
3 aggrieved candidate is a candidate for an office
4 has standing to challenge if they're running for
5 the same office.

6 THE COURT: So, let me tell you, I just read
7 way more election law cases than I ever wanted to.

8 But apparently when the challenge -- the
9 courts upheld that when the challenge is to the
10 procedure of the party, the opposing party, the
11 non-party member cannot -- even if they're an
12 opposing candidate, they cannot challenge the
13 petition.

14 However, where the challenge is to the content
15 of the petition that goes directly to whether or
16 not it satisfies the substantive provisions of the
17 Election Law, the courts have allowed aggrieved
18 candidates to be defined as opposing candidates of
19 a different party to challenge a nominating
20 petition, to bring an invalidation.

21 So, in particular I'll give you some case
22 cites here:

23 In the matter of Martin v Tootengion(ph), which
24 is a Third Department case, 89 AD 2nd 1034, they
25 permitted a member of the Republican party to

Bubel v Gigante

1 challenge the petition of a member of a Liberal
2 party. Is there a Liberal party?

3 In Maguire versus Gemash, which is a Second
4 Defendant case, 22 AD 3rd 614, the nominated
5 candidate of the Republican party and Conservative
6 party had standing as aggrieved candidate to bring
7 proceeding seeking to invalidate petition
8 nominating candidate of Senior Citizen's party for
9 the same position.

10 And that case cites a number of other cases:
11 Maher versus Board of Elections, matter of
12 Lifshitz(ph) v Palmateer, which we just talked
13 about and the other cases that I mentioned.

14 In Maher, they permitted a member of the
15 Democratic party to challenge -- I'm sorry. They
16 permitted a member of the Liberal party to
17 challenge a candidate who was running on the
18 Democratic party line and defined that person as an
19 aggrieved candidate.

20 The matter of Stempel versus Albany County.
21 Matter of Widler(ph) versus Christenfeld, which is
22 a New York Court of Appeals case. All of those
23 cases have discussions about that issue. And
24 ultimately it seems that the distinction, as I
25 said, is made between what the challenge is based

Bubel v Gigante

1 on.

2 MS. PATANE: I don't have all those cases in
3 front of me, but I believe that the specific
4 objections were made to the Board of Elections
5 prior to their commencement of the proceedings.
6 That's not the case here. The petitioners
7 commenced this proceeding by filing this action
8 before --

9 THE COURT: But 16-102 says that an aggrieved
10 candidate can do that. So, it all turns on whether
11 or not the definition of aggrieved candidate
12 applies here. And if it doesn't, then they have to
13 go to the Board of Elections. But if it does
14 apply, they are entitled under 16-102 to skip the
15 submissions to the Board of Election.

16 MR. GARVEY: I think the fact that -- that
17 they were denied at the Board of Election makes
18 them aggrieved. That's -- that's -- that's what
19 makes them aggrieved. So -- so, they have to go
20 through that process in order to come to court.

21 So -- so, the aggrieved candidate has to have
22 been -- under those definitions, has to have been
23 denied whatever relief they were seeking at the
24 Board of Elections in -- when they are challenging
25 petitions.

Bubel v Gigante

1 That's my understanding of it, Judge.

2 MR. SZALKIEWICZ: Judge, the absurdity of Mr.
3 Garvey's argument though is that, as you just said,
4 the candidate has the ability to come directly to
5 court without filing specific objections at the
6 Board of Election level.

7 In fact, case law says they can disregard all
8 the formalities of the Board of Election process
9 and come directly here. It's impossible for them
10 to be an aggrieved candidate then based on what the
11 Board of Election does if they're not even required
12 to go before the Board of Elections.

13 The law is clear, Your Honor, that an
14 aggrieved candidate is someone --

15 THE COURT: Well, either way, at this point
16 they've been -- they came to court.

17 You agree they were in court timely?

18 MR. GARVEY: I do.

19 THE COURT: Okay. At least on the first --

20 MR. GARVEY: Correct.

21 THE COURT: -- batch, right?

22 So, they were in court timely. And -- and as
23 an aggrieved candidate under the 16-102, they don't
24 have to go to the Board of Elections.

25 They went to the Board of Elections anyway,

Bubel v Gigante

1 which they sort of did after the fact, right? And
2 now they've been denied by the Board of Elections?

3 MR. GARVEY: Well, there have been no
4 determinations, Judge, so --

5 THE COURT: I mean, they still -- I think --
6 look, under these cases as I read them and under
7 the statutes as I read them, they qualify as
8 aggrieved candidates and the matter can proceed.

9 MR. SZALKIEWICZ: Thank you, Your Honor.

10 THE COURT: I will entertain -- since you
11 didn't have time to submit opposition and you
12 didn't have time obviously to reply, I'll
13 entertain -- we'll proceed, but I'll entertain
14 further submissions. And if it turns out that I
15 have a different point of view once I read the
16 additional material you want to submit, we can
17 obviously deal with that then.

18 MS. PATANE: Your Honor, if I we may move on
19 then to the fraud arguments?

20 THE COURT: Yes. Go ahead.

21 MS. PATANE: So, the respondents allege that
22 the motion to dismiss, aside from the threshold
23 matters, must also be dismissed as a result of a
24 failure to state a claim and failure to plead with
25 particularity.

Bubel v Gigante

1 The fraud allegations that were made in the
2 petition submitted by the petitioners failed to
3 plead the actual allegations of fraud with
4 particularity.

5 There is extensive case law in all of these
6 Election Law cases that say every single petition
7 has to plead fraud with particularity.

8 The petitioners don't even allege fraud. All
9 they state is that there was fraudulent
10 allegations.

11 Even if it's --

12 THE COURT: Fraudulent?

13 MS. PATANE: That there's fraudulent
14 behaviors. I apologize, Your Honor.

15 THE COURT: Okay.

16 MS. PATANE: Even if the petitioners rely on
17 the exhibit that they attached, which was bold
18 assertion objections, in that exhibit there's no
19 allegation of fraud. There's no pleading with
20 particularity.

21 For fraud there's material elements. There's
22 knowledge of fraud. There is intention to deceive.
23 There's misrepresentations. There's justifiable
24 reliance. And there's injury.

25 In not one allegation in the petition do any

Bubel v Gigante

1 of the petitioners mention any of these fraudulent
2 allegations.

3 There's no way to even move forward with this
4 action because they failed to plead with
5 particularity.

6 MR. SZALKIEWICZ: Again, without honestly
7 reading --

8 THE COURT: Point to me in your petition to
9 where you claim you've alleged with particularity
10 the requisite elements of fraud?

11 MR. SZALKIEWICZ: Paragraph 15, Paragraph 12.

12 THE COURT: Hang on.

13 MS. PATANE: Your Honor, I would like him to
14 specify the contents, not just Paragraph 15.

15 MR. SZALKIEWICZ: Paragraph 12.

16 THE COURT: Paragraph 12.

17 MR. SZALKIEWICZ: It purports that fraudulent
18 activity --

19 THE COURT: Hold on. You've got to slow down
20 and give me a chance to read it.

21 Paragraph what else, 15?

22 MR. SZALKIEWICZ: 12, 13, 14, 15, 16, 18.

23 You want to go through them line-by-line
24 objections, Your Honor? F stands for forgery.

25 THE COURT: What?

Bubel v Gigante

1 MR. SZALKIEWICZ: If you want to go through
2 Exhibit A -- Exhibit 1, which is incorporated?

3 THE COURT: Are there any other paragraphs?
4 Are those the sum total of the paragraphs in the
5 petition?

6 MR. SZALKIEWICZ: There's a general -- there
7 is a general allegation of fraud as well, Your
8 Honor, contained on Page 10.

9 THE COURT: Where is that?

10 MR. SZALKIEWICZ: We can go with M.

11 THE COURT: On Page 10?

12 MR. SZALKIEWICZ: I'm sorry. Not Page 10.
13 Paragraph 10, Judge.

14 THE COURT: Which provision of Paragraph 10 is
15 a fraud allegation?

16 MR. SZALKIEWICZ: M.

17 THE COURT: No, I don't think that --

18 MR. SZALKIEWICZ: That being said, Your
19 Honor --

20 THE COURT: I don't think Paragraph 10
21 contains any --

22 MR. SZALKIEWICZ: That being said, Your Honor,
23 we do stand by --

24 THE COURT: -- the other provisions.

25 MR. SZALKIEWICZ: And --

Bubel v Gigante

1 THE COURT: So, why don't -- I mean, it's
2 almost -- forget about Paragraph 10, but on the
3 other ones that he cited, why aren't those
4 sufficient?

5 MS. PATANE: Your Honor, every single
6 paragraph that he cited just merely states there
7 was fraudulent activity. It does not establish the
8 material elements of fraud.

9 THE COURT: Well, it says with -- it says --
10 this is Paragraph 12: Upon inform and belief,
11 respondent candidate Phillip Gigante - I don't know
12 if I'm saying his name right. I apologize - acting
13 as an attesting witness, allowed someone other than
14 the registered voter to sign for another without
15 the voter's permission or consent in violation of
16 the law, etc., etc.

17 Then it says the same thing about respondent
18 candidate Mr. Valvo allowing someone else to sign.

19 Paragraph 14 and Paragraph 15, with knowledge
20 collected fraudulent signatures. Same allegations
21 against Mr. Valvo.

22 So, there's a -- there's an alleged fraudulent
23 act, knowledge.

24 MS. PATANE: Your Honor --

25 THE COURT: Yeah.

Bubel v Gigante

1 MS. PATANE: -- if I may?

2 The paragraphs state upon information and
3 belief. In order to plead with particularity you
4 can't make allegations upon information and belief.

5 Aside from that, each allegation of fraud, in
6 order to make a prima facie case and plead with
7 particularity under the CPLR, has to have that
8 there's a material representation that was false.

9 Each of these paragraphs do not say there's a
10 material representation that was false. There also
11 has to have the representations were false and made
12 with intent to deceive the petitioners.

13 There's no allegation of that in any of the --
14 in any of the paragraphs in the petition that the
15 plaintiff justifiably relied on these
16 representations. No allegation that the
17 petitioners justifiably relied on any of these.

18 MR. SZALKIEWICZ: That's --

19 MS. PATANE: And no injury.

20 THE COURT: Go ahead.

21 MR. SZALKIEWICZ: The fraudulent activities
22 need to be defined within here. I understand that
23 they are citing the Common Law cases. This has
24 been upheld time and time again. And I provided
25 the court with multiple cases earlier this morning

Bubel v Gigante

1 regarding what is required for a permeation of
2 fraud.

3 MS. PATANE: Your Honor.

4 MR. SZALKIEWICZ: There is general allegations
5 of fraudulent activity contained within the
6 petition. We then annexed an eight-page sheet
7 detailing the different fraudulent activity of what
8 we are alleging. It's been held by the Second
9 Department in 2015, twice in 2013.

10 THE COURT: What case?

11 MR. SZALKIEWICZ: S-G-A-M-M-A-T-O v
12 Perillo(ph). Fraud was alleged where the specific
13 objections were annexed.

14 In Haygo(ph) --

15 THE COURT: Hold on.

16 MR. SZALKIEWICZ: And what's contained in the
17 letter, Your Honor, are direct quotes in the cases.

18 THE COURT: Are Gigante and Valvo the actual
19 candidates?

20 MR. SZALKIEWICZ: Yes.

21 MR. GARVEY: Yes.

22 MR. SZALKIEWICZ: And, Your Honor, if you look
23 at Mr. Valvo's petition, which is on Page 24, 25
24 and 26 --

25 THE COURT: Hang on.

Bubel v Gigante

1 MR. SZALKIEWICZ: Sorry.

2 THE COURT: So, counsel, did you take a look
3 at this, Sgammato?

4 MS. PATANE: I don't have the case in front of
5 me, Your Honor, but I do have other significant
6 case law that clearly counters this position.

7 MR. SZALKIEWICZ: Your Honor, if I may just --

8 THE COURT: Yeah.

9 MR. SZALKIEWICZ: Oberle, O-B-E-R-L-E, v
10 Caracappa. It's a Second Department case.

11 MS. PATANE: Your Honor, the one thing I would
12 like to note is that --

13 MR. SZALKIEWICZ: And going -- and going into
14 the details as well, Your Honor, as we said.
15 Specifically discussing Valvo's petition, it
16 clearly states in this specific objections that
17 were incorporated by reference, for an example,
18 lines 26/Signature 4, 26/Signature 5 and
19 26/Signature 7 were forgeries. It's fraud to
20 submit a fraudulent petition.

21 THE COURT: So, I'm just going read to you,
22 counsel, from Oberle, which is a Second Department
23 case, 133 AD 2nd 202.

24 Do you have it?

25 MS. PATANE: Yes.

Bubel v Gigante

1 MR. SZALKIEWICZ: I have --

2 MS. PATANE: Well, I don't have the full case.
3 I just have the paragraph.

4 THE COURT: You want to --

5 MR. GARVEY: I have it.

6 THE COURT: You have it. Okay.

7 The court, the trial court dismissed the
8 proceeding based on the arguments you just raised.
9 And the Appellate Division reversed and held that
10 although it was true that the 25 grounds listed in
11 the pleadings were asserted in general terms, the
12 specifications were incorporated by reference.
13 Thus, the trial court erred in dismissing those
14 claims for lack of specificity since the pleadings
15 and specifications combined together possessed the
16 required specificity. And then it goes on about
17 some trial issues.

18 And that holding is basically mirrored in
19 another Second Department case from 2015, the
20 Sgammato case. Which if you want to take a look at
21 it, I'll give it to you. Or do you have an extra
22 copy?

23 MR. SZALKIEWICZ: I have an extra copy for
24 counsel.

25 THE COURT: So, it's on the second page of

Bubel v Gigante

1 that decision which affirmed the trial court
2 denying the motion to dismiss.

3 It says initially the candidates contend that
4 the petition to invalidate should have been
5 dismissed since the allegations made in connection
6 with the claim of fraud were not sufficiently
7 specific to apprise them of the allegations of
8 fraud. The candidate's contention is without
9 merit.

10 Here, the petition to invalidate allege, inter
11 alia, that 147 signatures on the sheet were invalid
12 because the subscribing witness did not witness all
13 of the signatures on each of the pages and that the
14 entire petition was permeated by fraud, including
15 candidate fraud.

16 Moreover, the petition to invalid incorporated
17 by reference specific objections filed by the
18 objectors with the board prior to the commencement
19 of these proceedings.

20 Thus, the candidate received adequate notice
21 of the allegations supporting the claim that the
22 subscribing witness had falsely signed the witness
23 statement on the contested sheet, citing back to,
24 you know, again to Hardwick, and then Oberle and
25 etc.

Bubel v Gigante

1 MS. PATANE: Your Honor, if I may?

2 THE COURT: Yes.

3 MS. PATANE: The issue I have with these cases
4 is that we don't have the petition in front of us
5 to see what was actually pled. There's not even an
6 allegation in the petition --

7 THE COURT: Well, you have the objections
8 though?

9 MS. PATANE: Yes, but there's no -- there's no
10 allegation in -- in the objections on who the
11 individual was that committed the fraud or what the
12 fraud was.

13 THE COURT: But in the petition itself it
14 says -- it accuses -- anyway, it alleges that Mr.
15 Gigante and Mr. Valvo committed that fraud, unless
16 I'll misreading something.

17 Is that accurate?

18 MS. PATANE: No. Well, it's --

19 MR. SZALKIEWICZ: It's accurate, Your Honor.

20 MS. PATANE: It's indicating that, but it's --
21 it's referencing the attesting witness. So, how
22 could they possibly plead with particularity that
23 the respondents had knowledge of any fraudulent --
24 any fraudulent behavior on petitions that the --
25 that the respondents weren't even signing on.

Bubel v Gigante

1 If there's subscribing witnesses and signers
2 are on a petition and the respondents' names are
3 not on that petition --

4 THE COURT: But it says -- Paragraph 12
5 specifically says that Mr. Gigante was the
6 attesting witness.

7 MR. SZALKIEWICZ: That's correct. So was
8 Valvo.

9 THE COURT: And the same -- and the same
10 allegation is made against Mr. Valvo.

11 MS. PATANE: Your Honor, but every -- every
12 single allegation that they have references other
13 subscribing witnesses and signers.

14 THE COURT: What do you mean every allegation?
15 I'm reading from --

16 MS. PATANE: Every allegation that they have
17 and what they reference in their exhibits is
18 referencing other subscribing witnesses and
19 signers, not the candidates themselves.

20 THE COURT: Look at Paragraph 12 of the
21 petition.

22 MS. PATANE: I am, Your Honor, but --

23 THE COURT: Okay. It says -- it says Philip
24 Gigante, acting as an attesting witness, allowed
25 someone other than a registered voter to sign for

Bubel v Gigante

1 another without the voter's permission or
2 consent --

3 MS. PATANE: Who was it --

4 THE COURT: -- and the sworn -- the responding
5 candidate's sworn statement at the bottom of the
6 page. I don't know --

7 MS. PATANE: Your Honor, who was that someone?
8 You have to plead with particularity. The
9 petitioners did not plead with particularity. All
10 they're -- all they are saying is that the
11 respondents had knowledge of fraud, but there's --

12 THE COURT: I'm assuming -- yeah.

13 MS. PATANE: -- no explanation of the
14 knowledge of fraud.

15 THE COURT: Based on the prior holdings in
16 this department, I'm going to deny the motion to
17 dismiss on that basis.

18 MR. SZALKIEWICZ: Your Honor, prior to the
19 lunch break, can I call the first witness?

20 THE COURT: You want to take that first
21 witness?

22 MR. GARVEY: Your Honor, we have one more
23 threshold matter --

24 THE COURT: Sure.

25 MR. GARVEY: -- before we call the witness,

Bubel v Gigante

1 that is the matter of the village clerk of Airmont.

2 THE COURT: I'm sorry. What?

3 MR. GARVEY: The village clerk. The clerk,
4 all right, who --

5 THE COURT: Who is that? Who is that person?
6 Hi.

7 MR. GARVEY: It's our position that the
8 village clerk was not properly served and,
9 therefore, they --

10 THE COURT: Okay. How was service effectuated
11 on --

12 MR. GARVEY: Service was effectuated by
13 personal service, allegedly, which is according to
14 the Affidavit of Service, but it was also served by
15 overnight mail.

16 The overnight mail envelope has -- the address
17 was incorrect. There's very clear case law that an
18 incorrect address defeats service.

19 I'd like to, for the limited purposes of
20 determining if service was proper, call the village
21 clerk up and voir dire her concerning the service
22 that purportedly was made upon her person.

23 THE COURT: Come on up.

24 MR. SZALKIEWICZ: Judge, can we call our
25 witness, our first witness?

Bubel v Gigante

1 THE COURT: Well, this is a threshold issue.
2 If there's no service, I don't have jurisdiction.

3 MR. SZALKIEWICZ: But again, the court needs
4 to hear the matter anyway.

5 THE COURT: I do need to hear the matter
6 anyway, that's true.

7 MR. SZALKIEWICZ: So that's why I'd like to --

8 THE COURT: Let's -- let's take this real
9 quick. Go ahead.

10

11 LISA-ANN DiMARSICO-SMITH, having been first duly
12 sworn, was examined and testified as follows:

13

14 THE COURT: State your name.

15 THE WITNESS: Lisa-Ann DiMarsico-Smith.

16 D-I-M-A-R-S-I-C-O hyphen S-M-I-T-H.

17 MR. SZALKIEWICZ: Your Honor, also just as a
18 threshold matter, obviously, I object to this at
19 this point in the proceeding. This should have
20 been raised on Monday and it wasn't raised.

21 MR. GARVEY: She wasn't here.

22 THE COURT: Duly noted.

23 MR. GARVEY: She wasn't here, so she made no
24 appearance.

25 DIRECT EXAMINATION BY MR. GARVEY:

Direct - DiMarsico-Smith - Garvey

1 Q. Good morning, Ms. Smith.

2 A. Good morning.

3 Q. You realize that we're here on an Election Law
4 case, correct?

5 A. Yeah.

6 Q. And you realize that you're here in your capacity
7 as a village clerk in the village of Airmont?

8 MR. SZALKIEWICZ: Objection, Your Honor.

9 A. Yes.

10 THE COURT: It's background. I'll allow it.

11 Everybody slow down and speak loudly and
12 clearly, please.

13 Q. Ms. Smith, can you please state --

14 THE COURT: And don't speak over each over.

15 Q. Ms. Smith, could you please state your name for
16 the record.

17 A. My name is Lisa-Ann DiMarsico-Smith.

18 Q. Could you also state your current occupation?

19 A. I am the village clerk/treasurer for the village
20 of Airmont.

21 Q. Ms. Smith, did there come a time that you
22 received a package in the mail concerning the case
23 that we're here on today?

24 A. Yes, I did.

25 Q. And can you tell me when you received that

Cross - DiMarsico-Smith - Szalkiewicz

1 package?

2 A. That was received on February 22nd, around
3 approximately 9:45 in the morning.

4 Q. February 22nd?

5 A. Correct.

6 Q. And do you have that package with you today?

7 A. Yes, I do.

8 Q. Can you describe what that package -- strike
9 that.

10 Is that a US Postal Service package?

11 A. Yes, it is.

12 Q. Is there an address on the front of it?

13 A. There is.

14 Q. And is that address correct?

15 A. No, it is not.

16 Q. Can you tell me why it's not correct?

17 A. The zip code is incorrect.

18 Q. Did there come a time where the papers concerning
19 this suit, if you knew -- or strike that.

20 Did there come a time where a process server
21 approached you while you were at your place of
22 employment?

23 A. Yes.

24 Q. Can you tell me when that happened?

25 A. That happened on Tuesday, February 19th, in the

Cross - DiMarsico-Smith - Szalkiewicz

1 Board of Trustees meeting. He approached me and
2 asked if I would accept on behalf of Anthony Valvo.

3 Q. And did you reply?

4 A. Yes, I did.

5 Q. What was your reply?

6 A. Yes.

7 Q. And did the process server say anything else to
8 you?

9 A. Then he handed me an additional copy and said
10 this is a courtesy copy for you.

11 MR. GARVEY: No further questions, Your Honor.

12 THE COURT: Okay. Go ahead.

13

14 CROSS-EXAMINATION BY MR. SZALKIEWICZ:

15

16 Q. Do you -- is there some procedure that logs in
17 mail that's received by the village of Airmont?

18 A. Yes, there is.

19 Q. And can I please have the procedure?

20 A. We open it and there's a time date stamp.

21 Q. Were you personally hand delivered a copy of the
22 Order to Show Cause on February 19th, 2019?

23 A. For Anthony Valvo, yeah.

24 Q. Were you also hand-delivered a second copy of it?

25 A. As a courtesy.

Cross - DiMarsico-Smith - Szalkiewicz

1 Q. That's not my question.

2 A. Yes.

3 Q. My question is, were you hand delivered a second
4 copy of it?

5 A. Yes.

6 Q. Are you related to any of the members of this
7 proceeding?

8 A. No.

9 Q. Are you related to any witnesses that signed
10 petitions on behalf of any of the respondents in this
11 case?

12 A. Witnesses?

13 Q. Witnesses, subscribing witnesses.

14 A. Yes.

15 Q. Which ones?

16 A. My mother.

17 Q. What's your mother's name?

18 A. Rosamond Lancia.

19 Q. Who else?

20 A. And Robert Lancia.

21 THE COURT: Is that your father?

22 THE WITNESS: My brother.

23 THE COURT: Your brother.

24 Q. What did you do when you received the copy of the
25 paperwork on February 19th, 2019?

Cross - DiMarsico-Smith - Szalkiewicz

1 A. The mailed copied?

2 Q. No, the hand-delivered copy.

3 A. I put one in Anthony Valvo's box and put one and
4 we proceeded with our meeting.

5 Q. Where did you put the second one?

6 A. I have it with me.

7 Q. What do you mean?

8 A. It was placed in my -- with my papers during the
9 meeting.

10 Q. What about the next day, what did you do with it?

11 A. It's right here. It was stamped in.

12 THE COURT: Did you time -- did you date and
13 stamp the copy that -- the courtesy copy, the
14 second copy that was handed to you?

15 THE WITNESS: No.

16 THE COURT: Was it stamped?

17 THE WITNESS: No, because it wasn't during
18 business hours. It was at a meeting.

19 The one that was delivered in the mail, yes.

20 THE COURT: Okay. And did you subsequently
21 stamp it or date it or anything?

22 THE WITNESS: No.

23 THE COURT: Okay.

24 Q. Is the -- at the meeting that you were served at,
25 is that a town meeting?

Cross - DiMarsico-Smith - Szalkiewicz

1 A. Yes, it is.

2 Q. Village or town? I apologize.

3 A. Village.

4 Q. And is it called by the trustees of the village?

5 A. Yes.

6 Q. And is it -- are you mandated to be there as part
7 of your employment as a trustee/treasurer?

8 A. Yeah.

9 Q. So, you were there in your official capacity as
10 the treasurer or trustee?

11 A. As the village clerk.

12 Q. As clerk?

13 A. Yes.

14 Q. And were you sitting in the audience or were you
15 sitting up at the table with the other members of the
16 village?

17 A. Yes, I was sitting up at the table.

18 Q. Can I see a copy of that package that you
19 received?

20 MR. GARVEY: I have no objection, even though
21 it's not in evidence, Your Honor.

22 MR. SZALKIEWICZ: Well, she introduced it into
23 evidence.

24 THE COURT: Well, it's not in evidence, but he
25 can take a look at it.

Cross - DiMarsico-Smith - Szalkiewicz

1 (Whereupon, there was a pause in the
2 proceeding while Mr. Szalkiewicz reviewed the
3 document.)

4 MR. SZALKIEWICZ: Your Honor, I'd like to mark
5 this into evidence as Exhibit 1.

6 THE COURT: Any objection?

7 MR. GARVEY: No objection.

8 THE COURT: Okay. Petitioner's Exhibit 1 in
9 evidence on consent.

10 MR. GARVEY: The whole envelope?

11 MR. SZALKIEWICZ: The envelope.

12 You don't contest that the contents of the
13 envelope are actually --

14 MR. GARVEY: I do not.

15 MR. SZALKIEWICZ: So, the envelope.

16 THE COURT: So, stipulated that the envelope
17 contains --

18 MR. SZALKIEWICZ: May I approach, Your Honor?

19 I apologize. It's just easier if I look at this.

20 Q. Do you see the markings on the bottom --

21 COURT REPORTER: Am I marking it?

22 THE COURT: Wait. Hang on a second. I
23 thought we marked it?

24 MR. SZALKIEWICZ: Mark it. Sorry about that.

25 THE COURT: She's got to mark it, so we'll

Cross - DiMarsico-Smith - Szalkiewicz

1 mark it.

2 (Whereupon, a priority mail envelope was
3 marked Petitioner's Exhibit 1 in evidence.)

4 Q. So, could you just look at the address, please,
5 that's written over there. The first line of the
6 address, what does it say?

7 (Whereupon, the witness looked at the
8 exhibit.)

9 A. Airmont Village Hall, Village Clerk, 251 Cherry
10 Lane.

11 Q. Is that the correct address of the village hall
12 and village clerk?

13 A. That is the physical address, yes.

14 Q. Okay. Can I see that one more time? I just want
15 to take a picture of it so it's easier, so we don't
16 have to keep going back and forth.

17 MR. GARVEY: I have no objection, Your Honor.

18 MR. SZALKIEWICZ: I just don't want to keep
19 handing her the envelope and back. I've never seen
20 this before, Judge, until about five seconds ago.

21 Q. Do you see on the right-hand side it says --
22 where it says -- there's red markings on the bottom
23 right-hand side?

24 A. The red box?

25 Q. Yes.

Cross - DiMarsico-Smith - Szalkiewicz

1 A. Yes.

2 Q. Is there any date input into that red box?

3 A. I see 2/20.

4 Q. Okay. And do you know who inputted that there?

5 A. It's initialed. I'm assuming through the Postal
6 Service.

7 Q. Does the village of Airmont maintain a website?

8 A. Yes, we do.

9 Q. And is that the official website of the village
10 of Airmont?

11 A. Yes, it is.

12 Q. Do you know what address, the zip code the
13 village of the Airmont has on their --

14 MR. GARVEY: Objection, Your Honor.

15 Relevance.

16 MR. SZALKIEWICZ: If she knows.

17 THE COURT: Overruled.

18 Q. What zip code the village of Airmont has on its
19 website?

20 A. From the best of my knowledge it would be 10982.

21 MR. SZALKIEWICZ: I'm at a little bit of a
22 disadvantage, Your Honor, because I haven't pulled
23 up on my computer --

24 Q. Has the village of Airmont ever used the zip code
25 10952 for the 251 Cherry Lane?

Bubel v Gigante

1 A. I'm not sure.

2 THE COURT: Do you know what zip code is on
3 the website?

4 MR. SZALKIEWICZ: I do, Your Honor, but I
5 can't print out --

6 THE COURT: No, I wasn't asking you.

7 MR. SZALKIEWICZ: Sorry.

8 Q. Do you know what --

9 A. Off the top of my head, no, I don't.

10 THE COURT: I'll allow you to ask subject to
11 connection.

12 MR. SZALKIEWICZ: That's fine.

13 Your Honor, I have no further questions at
14 this time.

15 THE COURT: Okay. Anything else, Mr. Garvey?

16 MR. GARVEY: Just one second, Judge.

17 (Whereupon, there is a pause in the
18 proceeding.)

19 MR. GARVEY: No further questions, Judge.

20 Thank you.

21 THE COURT: Thanks.

22 MR. GARVEY: Judge, I'd like to give you some
23 case law on incorrect zip code, if I could?

24 THE COURT: You want to just give me cites?

25 MR. GARVEY: I'll give you cites.

Bubel v Gigante

1 180 AD 2nd, complaint was dismissed for
2 improper service; therefore, no personal
3 jurisdiction.

4 THE COURT: Wait. 180 AD 2nd what?

5 MR. GARVEY: AD 2nd 712.

6 THE COURT: 712?

7 MR. GARVEY: Correct. AD 2nd 687, 688.

8 THE COURT: Same, 180?

9 MR. GARVEY: Yes. Thank you.

10 THE COURT: Yeah.

11 MR. GARVEY: AD 2nd 425 -- I'm sorry. 258 AD
12 2nd 425, the first part of the case. The court
13 lacked personal jurisdiction when they failed to
14 establish the summons was mailed to the correct
15 address.

16 MR. SZALKIEWICZ: Your Honor, there's two
17 things that obviously we would need to be able to
18 present evidence to it.

19 One, according to the US -- case law states
20 that when mail is done by overnight mail, the
21 petitioners obviously have the ability to rebut
22 when it's actually received.

23 According to the United States Post Office
24 tracking information - which I'll provide the court
25 and respondent with - it was delivered at - using

Bubel v Gigante

1 this tracking information - delivered on February
2 20th, 2019, at 10:11 a.m.

3 MR. GARVEY: Objection, Your Honor.

4 MR. SZALKIEWICZ: Subject to connection.

5 That further, Your Honor --

6 MR. GARVEY: Objection, Your Honor.

7 THE COURT: It's hearsay, so I'm going to
8 sustain the objection, unless you're able to --

9 MR. SZALKIEWICZ: We can have someone from the
10 Post Office come in, Your Honor.

11 I'll take it a step further, Your Honor. We
12 could call further witnesses to testify or the
13 court could take judicial notice that the village
14 of Airmont, on their official website, uses the zip
15 code 10952.

16 MR. GARVEY: Objection, Your Honor. Hearsay.

17 MR. SZALKIEWICZ: The court has the ability to
18 take notice --

19 THE COURT: So, why can't I take judi -- I can
20 take judicial notice of their website. It's a
21 government -- it's a government official website
22 page. Why can't I take judicial notice of that?

23 MR. GARVEY: Well, you're not. You're taking
24 his word for it, number one.

25 THE COURT: No --

Bubel v Gigante

1 MR. GARVEY: Number two --

2 THE COURT: -- he's asking me to take judicial
3 notice of it. So, why can't I do that?

4 MR. GARVEY: I still say that's hearsay, but I
5 say that it's -- it's not relevant. What the
6 actual address is of the -- of the village hall is
7 determined by United States Postal Service for
8 purposes of delivering mail. We've had testimony
9 that -- that the address on the document is
10 incorrect and, therefore, it's improper service.

11 THE COURT: All right. I'll take a look at
12 your cases.

13 MR. SZALKIEWICZ: Your Honor, I'm sorry. Like
14 I said as a threshold matter, the village of
15 Airmont, under an official government website,
16 holds itself out to have its official address as
17 10952. Therefore, it is beyond reasonable for the
18 petitioners to rely on what the village has on its
19 website.

20 This also, Your Honor, is not -- and I have
21 not had a chance to brief this. Even dealing with
22 the fact that the clerk, in her official capacity,
23 at an official meeting, was hand delivered a copy
24 of the petition.

25 It's my understanding as well, Your Honor,

Bubel v Gigante

1 that the village of Airmont maintains a video of
2 these meetings. And it's possible we can review
3 that video, subject to authentication, because they
4 put it on YouTube, where you can see the respo --
5 the responding clerk being hand delivered a copy of
6 the order.

7 THE COURT: I don't think she was disputing
8 that she was handed it.

9 MR. SZALKIEWICZ: But she's alleging that
10 statements were made that it's a courtesy copy.

11 MR. GARVEY: To the service of Anthony Valvo.

12 MR. SZALKIEWICZ: With that being said, Your
13 Honor, we can have the process server --

14 THE COURT: Do you have an Affidavit of
15 Service?

16 MR. SZALKIEWICZ: We do, Your Honor.

17 THE COURT: And is it filled out by a process
18 server?

19 MR. SZALKIEWICZ: It is filled out by a
20 process server.

21 THE COURT: Can I see it?

22 MR. SZALKIEWICZ: It's already been filed.

23 Your Honor, I apologize. Is there any way we
24 can have permission to just extend past 12:30, so
25 we can call the witness?

Bubel v Gigante

1 MR. GARVEY: I object to calling the witness
2 until we're done, Judge. I understand what counsel
3 is trying to do, but I --

4 MR. SZALKIEWICZ: It's going to be --

5 MR. GARVEY: We have not established personal
6 jurisdiction.

7 MR. SZALKIEWICZ: The matter needs to be heard
8 anyway pursuant to the rules of --

9 THE COURT: It does. It does need to be heard
10 regardless, Mr. Garvey, so...

11 But this Affidavit of Service -- maybe you
12 have to call the process server. I don't know.
13 I'll look at the cases. You figure out what it is
14 you want to bring in on the delivery in the actual
15 mailing and the website, etc.

16 We're going to adjourn until 2:00 and we're
17 going to go today only until 3:30.

18 MR. SZALKIEWICZ: Your Honor, is there any way
19 we can -- I apologize. Is there any way just so
20 his parents.

21 UNIDENTIFIED MEMBER OF THE AUDIENCE: They're
22 91 and 86, Your Honor. This is a hardship for
23 them.

24 THE COURT: Eddie, can you call Bob and see --

25 MR. GARVEY: Your Honor, can we have a

Bubel v Gigante

1 conference, attorneys?

2 THE COURT: No, let's get this done first.

3 MR. GARVEY: It's imperative. I plead with
4 the court to allow me to have a conference for
5 three minutes. I think you'll appreciate the
6 conference.

7 THE COURT: Come on.

8 (Whereupon, Mr. Szalkiewicz, Mr. Garvey, Ms.
9 Patane and Ms. Obremski conferred with the judge in
10 chambers.)

11 THE COURT: Okay. We just had a conference,
12 an attorneys' conference.

13 Mr. Garvey?

14 MR. GARVEY: Thank you, Your Honor.

15 Upon very strict written instructions from my
16 clients, all three of them - which represents
17 Philip Gigante, Anthony Valvo, Paul Marchesani - we
18 have consented, I believe, to the entry of a
19 judgment in favor of the petitioners that
20 respondents' signature requirements were not
21 sufficient to allow them access to the ballot.

22 THE COURT: Counsel?

23 MR. SZALKIEWICZ: I appreciate that, Your
24 Honor and, obviously, I have nothing further than
25 that, for once in my life.

Bubel v Gigante

1 THE COURT: Okay. So, we're not going to
2 proceed any further with either the service issue
3 or the fraud issue. There will be no findings
4 against the respondents, other than a finding that
5 the signature provisions were not sufficient to
6 meet the statutory requirements.

7 MR. SZALKIEWICZ: The clerk is hereby enjoined
8 from --

9 THE COURT: Yes, the Board of Elections and
10 the village clerk are enjoined from placing the
11 names of the respondents on the ballot for this
12 village election, which is to take place.

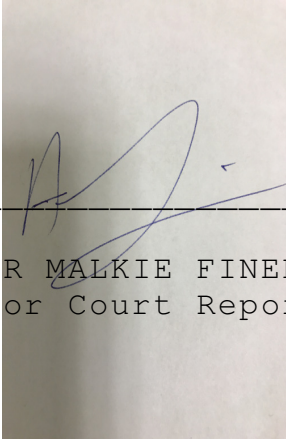
13 Thank you, everybody.

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Bubel v Gigante

REPORTER'S CERTIFICATION

I, AMBER MALKIE FINER, do hereby certify that
the foregoing is a true and accurate transcript.



AMBER MALKIE FINER
Senior Court Reporter

INDEX OF WITNESSES

WITNESS	DIRECT	CROSS
L DiMARSICO-SMITH	46	48

EXHIBITS

PETITIONER	EXHIBIT	ID	EVD
1	Priority mail envelope		53